Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

T.B., A person coming under the juvenile court law,

Petitioner

v.

THE SUPERIOR COURT FOR THE COUNTY OF SAN BERNARDINO,

Respondent,

THE PEOPLE OF THE STATE OF CALIFORNIA,

Real Party in Interest,

On Petition For Writ Of Certiorari To The Superior Court Of California, County Of San Bernardino

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does California law that confers upon adults the right to pretrial appellate review of a denial of a motion to suppress evidence based on alleged violations of the Fourth Amendment but that denies juveniles the right to do the same violate the Equal Protection Clause?

2. Does a person's mere proximity to the general area where a crime was committed justify a detention of that person for investigatory purposes?

PARTIES TO THE PROCEEDING

There are no parties to this matter other than those named in the caption.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED.....i

PARTIES TO THE PROCEEDING.....ii

TABLE OF AUTHORITIES.....v

OPINIONS BELOW.....1

JURISDICTION IN THIS COURT.....1

CONSTITUTIONAL AND STATUTORY PROVISIONS.....2

STATEMENT OF THE CASE.....4

REASONS FOR GRANTING THE PETITION.....7

I. Why the Statutory Scheme at Issue Here Violates the Equal Protection Clause.....7

II. The Motion to Suppress.....14

a. The Law.....14

b. Testimony at the Motion to Suppress.....14

c. Discussion.....17

TABLE OF CONTENTS – Continued

Page

d. Conclusion.....19

CONCLUSION.....20

APPENDIX

A. Minute order reflecting denial of motion to suppress by juvenile court, dated August 26, 2009 **[FILED UNDER SEAL]**.....App. 1

B. Order of denial of petition for writ of mandate by Court of Appeal, dated October 9, 2009.....App. 2

C. Order of denial of petition for review by California Supreme Court, dated December 17, 2009.....App. 3

TABLE OF AUTHORITIES

Page

Cases

Abdullah B. v. Superior Court
(1982) 135 Cal.App.3d 838.....8

Chimel v. California
(1969) 395 U.S. 752.....7

Clark v. Jeter
(1988) 486 U.S. 4566.....7

Cox Broadcasting Corp. v. Cohn
(1975) 420 U.S. 469 1

Davis v. Mississippi
(1969) 394 U.S. 721.....14

Dunaway v. New York
(1979) 442 U.S. 200.....14

Dunn v. Blumstein
(1972) 405 U.S. 330, 335.....9

Fla. v. Royer
(1983) 460 U.S. 491.....14

Gouled v. United States
(1921) 255 U.S. 298.....7

TABLE OF AUTHORITIES – Continued

Page

Griffin v. Illinois
(1956) 351 U.S. 12.....7

Halbert v. Michigan
(2001) 545 U.S. 605.....7

Harris v. United States
(1947) 331 U.S. 145.....7

Illinois v. Wardlow
(2000) 528 U.S. 119, 124.....14

In re Harvey
(1972) 222 Pa. Super. 222.....13

In re Jaime P.
(2006) 40 Cal.4th 128.....12, 13

In re Scott K.
(1979) 24 Cal.3d 39.....10, 11

In re Tyrell J.
(1994) 8 Cal.4th 68.....11, 12

Kaupp v. Texas
(2003) 538 U.S. 626.....14

People v. Laiwa
(1983) 34 Cal.3d 711.....3

TABLE OF AUTHORITIES – Continued

Page

People v. Olivas
(1976) 17 Cal.3d 236.....8

People v. Sanders
(2004) 31 Cal.4th 318.....12

People v. Trujillo
(1990) 217 Cal.App.3d 1219.....3

Romer v. Evans
(1996) 517 U.S. 620.....10

Schmidlin v. City of Palo Alto
(2007) 157 Cal.App.4th 728.....3

State v. Lowry
(1967) 95 N.J. Super. 307.....13

Ybarra v. Illinois
(1979) 444 U.S. 85, 91.....14

Constitutional Provisions

U.S. Const., 4th Amend. 2

U.S. Const., 14th Amend. 2

TABLE OF AUTHORITIES – Continued

Page

California Statutes

Penal Code § 459.....5

Penal Code § 496, subd. (a)..... 5

Penal Code § 594, subd. (b)(1)..... 5

Penal Code § 594, subd. (b)(1)(A).....5

Penal Code § 602, subd. (k)..... 5

Penal Code § 1538.5, sub. (i).....2

Penal Code § 1538.5, subd. (j).....3

Welfare & Institutions Code § 700.1..... 3

Welfare & Institutions Code § 701.....4

Welfare & Institutions Code § 800.....8

Other authorities

28 U.S.C. § 1257(a).....1

OPINIONS BELOW

The opinions below are contained in the Appendices (App.) to this Petition:

A. The juvenile court's[1] August 26, 2009 minute order reflecting the denial of Petitioner's motion to suppress[2] is reproduced at App. A.

B. The California Court of Appeal's October 9, 2009 order denying Petitioner's petition for a writ of mandate is reproduced at App. B.

C. The California Supreme Court's December 17, 2009 order denying Petitioner's petition for review is reproduced at App. C.

JURISDICTION IN THIS COURT

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) as interpreted by this Court in *Cox Broadcasting Corp. v. Cohn* (1975) 420 U.S. 469, 479: Petitioner has no other defense in the state court other than his federal claim and cannot prevail at trial on the facts of the case or any other nonfederal ground.

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[1] All references to the juvenile court are to the San Bernardino County Superior Court, sitting in separate session as a juvenile court.

[2] All references to a "motion to suppress" are to a motion to suppress evidence allegedly seized in violation of the Fourth Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides, in pertinent part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated..."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "No State shall...deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

California Penal Code section 1538.5, subdivision (i),[3] permits adults in felony cases to challenge the denial of a motion to suppress by way of petition for a pretrial writ. The statute states, in pertinent part:

> "After the special hearing [the motion to suppress] is held, any review thereafter desired by the defendant prior to trial shall be by means of an extraordinary writ of mandate or prohibition filed within 30 days after the denial of his or her motion at the special hearing."

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[3] All statutory references are to California statutes.

Penal Code section 1538.5, subdivision (j), permits adults in misdemeanor cases to challenge the denial of a motion to suppress by immediate appeal to the appellate division of the superior court, and in pertinent part states:

> "If the property or evidence seized relates solely to a misdemeanor complaint, and the defendant made a motion for...the suppression of evidence in the superior court prior to trial, both the people and defendant shall have the right to appeal any decision of that court relating to that motion to the appellate division..."[4]

Welfare and Institutions Code section 700.1 sets forth the procedures regarding litigation of motions to suppress in the juvenile court and provides:

> "Any motion to suppress as evidence any tangible or intangible thing obtained as a result of an unlawful search or seizure shall be heard prior to the attachment of jeopardy and

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[4] The California appellate courts recognize Penal Code section 1538.5, subdivision (j), as permitting adults in misdemeanor cases to immediately challenge the denial of a motion to suppress by way of pretrial appellate review. *People v. Laiwa* (1983) 34 Cal.3d 711, 717 (superseded by statute on other grounds as noted in *People v. Trujillo* (1990) 217 Cal.App.3d 1219, 1223); *Schmidlin v. City of Palo Alto* (2007) 157 Cal.App.4th 728, 773-774.

> shall be heard at least five judicial days after receipt of notice by the people unless the people are willing to waive a portion of this time.
>
> If the court grants a motion to suppress prior to the attachment of jeopardy over the objection of the people, the court shall enter a judgment of dismissal as to all counts of the petition except those counts on which the prosecuting attorney elects to proceed pursuant to Section 701.
>
> If, prior to the attachment of jeopardy, opportunity for this motion did not exist or the person alleged to come within the provisions of the juvenile court law was not aware of the grounds for the motion, that person shall have the right to make this motion during the course of the proceeding under Section 701."

STATEMENT OF THE CASE

On February 4, 2009, at approximately 9:00 a.m., Deputy Smoot of the San Bernardino County Sheriff's Office (SBSO) was dispatched to a vandalism report at the Joshua Springs Calvary Church/School (church) located in Yucca Valley, California. There had been a series of vandalisms and burglaries at the church and school. After interviewing a church employee and local resident

Deputy Smoot and two detectives detained Petitioner and another male juvenile (co-participant) regarding the vandalism reported that day. Petitioner and his co-participant confessed to the vandalism, as well as other vandalisms and burglaries that had occurred on the church property. Both juveniles were taken to their homes and consented to searches of their bedrooms. Property belonging to the church was recovered at both locations.

On April 10, 2009, a juvenile wardship petition was filed charging Petitioner with two counts of felony second degree burglary (Pen. Code, § 459), one count of felony vandalism (Pen. Code, § 594, subd. (b)(1)), and one count of felony receiving stolen property (Pen. Code, § 496, subd. (a)).[5]

On May 26, 2009, an amended petition was filed charging Petitioner with an additional count of misdemeanor vandalism (Pen. Code, § 594, subd. (b)(1)(A)), and one count of misdemeanor trespassing (Pen. Code, §602, subd. (k));[6] the added counts

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[5] Counts one through four, respectively. A separate juvenile petition alleging the same charges was filed against Petitioner's co-participant.

[6] Counts five and six, respectively. Petitioner's co-participant from counts one through four was not alleged to be involved in added counts five and six, and was not charged with those crimes.

involved allegations unrelated to the first four counts and were not part of Petitioner's motion to suppress.[7]

On July 28, 2009, Petitioner filed a motion to suppress in the juvenile court. On August 5, 2009, Real Party in Interest filed their opposition.

On August 26, 2009, Petitioner's motion to suppress was heard in the juvenile court. The court found that Petitioner had been detained, but that the deputies had reasonable suspicion to do so. The motion to suppress was denied.[8] (App. A [filed under seal].)

On October 6, 2009, Petitioner filed a Petition for a peremptory writ of mandate/prohibition in the California Court of Appeal, Fourth District, Division Two. On October 9, 2009, the petition was summarily denied by order (at App. 2).

On October 15, 2009, Petitioner filed a petition for review in the California Supreme Court. On December 17, 2009, the petition was denied (at App. 3).

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[7] No relief related to counts five and six in the amended petition was sought by Petitioner in the California appellate courts, and no review related to those counts is requested of this Court.

[8] Petitioner's co-participant's motion to suppress was heard in the juvenile court on June 17, 2009. The court's rulings were the same as in Petitioner's motion, and the motion to suppress was denied.

REASONS FOR GRANTING THE PETITION

A grant of review in this case is necessary to settle important questions of federal constitutional law and to secure uniformity of the law.

I. Why the Statutory Scheme at Issue Here Violates the Equal Protection Clause

California is not required to provide pretrial appellate review for Fourth Amendment violations; but having done so, the state cannot "bolt the door to equal justice." *Halbert v. Michigan* (2001) 545 U.S. 605, 610. See also *Griffin v. Illinois* (1956) 351 U.S. 12, 15-17.

The statutory scheme at issue here involves legislation which bestows upon one class of citizen's (adults) greater protection from Fourth Amendment violations than that which is afforded another class (juveniles). This limitation impinges on the exercise of a fundamental right[9] and is therefore subject to strict scrutiny.[10] It is the State that bears the burden

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[9] This Court has long recognized Fourth Amendment rights as fundamental and has held they "...are to be regarded as of the very essence of constitutional liberty..." *Harris v. United States* (1947) 331 U.S. 145, 150 (overruled on other grounds in *Chimel v. California* (1969) 395 U.S. 752) quoting *Gouled* v. *United States* (1921) 255 U.S. 298, 304.

[10] Classifications affecting fundamental rights are given the most exacting scrutiny. *Clark v. Jeter* (1988) 486 U.S. 456, 461.

of establishing this legislative scheme is necessary to further a compelling state interest.[11]

Abdullah B. v. Superior Court (1982) 135 Cal.App.3d 838 is the lone California decision holding the statutory scheme at issue here does not violate the Equal Protection Clause. In *Abdullah B.* the Court of Appeal did recognize that the Fourth Amendment applies to juveniles, and the disadvantages a juvenile faces by not being allowed to challenge the denial of a motion to suppress by way of pretrial review. (*Id,* at pp. 843-844.) Notwithstanding, the Court held that deprivation of this right was balanced by the favoritism given juveniles in the appeals process. (*Id,* at p. 844.) Specifically, the Court held that a "sentence" in Welfare and Institutions Code section 800, which mandates juvenile appeals be given priority over all other appeals, "...more than compensates for the absence of pretrial review." (*Ibid.*) The Court offered no statistics in support of its conclusions.

Statistics reported by the Judicial Council of California for the last twelve years comparing the average time adult and juvenile appeals take from the time a notice of appeal is filed to the filing of an opinion show juvenile appeals are decided sooner than adult appeals.[12] The average over the past twelve years is 408 days for adult appeals and 256

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[11] *People v. Olivas* (1976) 17 Cal.3d 236.

[12] The statistics posted on the California Courts website begin in 1998, fourteen years after *Abdullah B.* was decided. (See http://www.courtinfo.ca.gov/reference/3_stats.htm.)

days for juveniles. The numbers change dramatically regarding the amount of time adults must wait for initial appellate review of a denial of a motion to suppress as compared to juveniles. Adults may seek initial appellate review of the denial of a motion to suppress before entering a plea of guilty or being forced to go to trial; a juvenile may not. If an adult's pretrial review is successful, he or she will spend ***0 days*** on probation or incarcerated. A juvenile with a valid Fourth Amendment claim whose motion to suppress is denied is forced to enter an admission (plead guilty), or have a jurisdictional hearing (trial), probably not prevail, and then be placed on probation or incarcerated on average for eight months before the denial of his or her motion to suppress is reversed on appeal. ***0 days*** for adults, but an average of ***256 days*** (over ***eight months***) for a juvenile is hardly a "fair balance."[13]

There were at least two other major flaws with the Court's analysis. First, the Court never stated what standard of review it was applying, *i.e.* strict scrutiny, intermediate scrutiny, rational basis.[14] Second, and most significantly, the Court never

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[13] These statistics further show that over a twelve year period 10 percent of juvenile appeals took an average of 408 days before an opinion was filed. This means a juvenile who falls into this category, and who has a valid Fourth Amendment claim, will be on probation or incarcerated for over one year before his case is reversed on appeal. ***0 days*** for an adult, but over ***365 days*** (***one year***) for a juvenile is, again, hardly a fair balance.

[14] In considering an equal protection claim a court must first determine the appropriate standard of review. (*Dunn v. Blumstein* (1972) 405 U.S. 330, 335.)

stated what interest California has in limiting a juvenile's right to assert a violation of Fourth Amendment rights.[15] Without identifying the State's interest in permitting adults to seek pretrial review of a denial of a motion to suppress while prohibiting juveniles to do the same, the Court's conclusion that the State doing so does not violate the Equal Protection Clause does not pass constitutional scrutiny.

As far back as 1979 the California Supreme Court recognized that the State's interest in promoting the health and welfare of children was not compromised by equal enforcement of search and seizure laws. In *In re Scott K.* (1979) 24 Cal.3d 39 the Minor's father gave police consent to search a locked toolbox in the Minor's bedroom. Marijuana was found in the toolbox. After his motion to suppress was denied, the Minor admitted possessing marijuana for sale. On appeal the Minor claimed the consent his father gave police to search his personal property violated his Fourth Amendment rights. The People claimed the Minor's father had authority to inspect the Minor's belongings to promote the child's health and welfare.

The Supreme Court reversed the denial of the Minor's motion to suppress. The Court reaffirmed

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[15] Identification of the State's interest is mandatory in any equal protection analysis. (*Romer v. Evans* (1996) 517 U.S. 620, 632 ["...even in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained."].)

that juvenile rights are by no means coextensive with those of adults, and that "minors' rights are often legitimately curtailed to serve a state's interest in promoting the health and growth of children." (*Scott K., supra,* 24 Cal.3d at p. 401.) However, regarding the Fourth Amendment, the Court went on to state:

> "Search and seizure laws, however, hardly seem disruptive or otherwise inconsistent with the state's interest in child welfare. It is established that minors have a liberty interest that entitles them to due process whenever a state initiates action to deprive them of liberty. [Citations.] Enforcement of search and seizure protection helps ensure that the fact finding process conforms with standards of due process.
>
> Justice should not be compromised by well-intentioned aims to correct transgressing youths, and the rehabilitative value of treating juveniles with fairness must not be underrated. [Citation.]" (*Scott K.*, 24 Cal.3d at p. 402.)

In *In re Tyrell J.* (1994) 8 Cal.4th 68, the Supreme Court reached a different conclusion than it did in *Scott K.* In *Tyrell J.* the Court found that juvenile probationers did not have a reasonable expectation of privacy over their person or property, and could therefore be lawfully searched by a law

enforcement officer who was unaware the juvenile was subject to a probation search term. (*Tyrell J., supra,* 8 Cal.4th at p. 86.) The Court concluded that requiring officers to have advance knowledge of a juvenile probation search condition was inconsistent with the special needs of the juvenile probation scheme, and that allowing warrantless probation searches of juveniles deterred future misconduct assisted in their rehabilitation. (*Id,* at pp. 86-87.)

Tyrell J. received a "chilly reception,"[16] and twelve years later the California Supreme Court reversed itself. In *In re Jaime P.* (2006) 40 Cal.4th 128, the Supreme Court again addressed the legality of a search of a juvenile probationer by an officer who was unaware the juvenile was on probation. The Court held that developments subsequent to its decision in *Tyrell J.* lead to the conclusion that *Tyrell J.* had been wrongly decided, that it had generated inequitable and legally unjustified results, and unless overruled would continue to do so. (*Jaime P., supra,* 40 Cal.4th at p. 133.)

The Court squarely addressed the question 'What of *Tyrell J.'s* reliance on "the special needs of the juvenile probation scheme"?' (Inner quotations original.) (*Id,* at p. 134.) On this point the Court stated:

> 'If there are other "special needs" of the juvenile probation system that would be undermined by the rule we

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[16] *People v. Sanders* (2004) 31 Cal.4th 318, 328.

> propose, the People do not identify them, nor do we discern any.' (Inner quotations original.) (*Ibid.*)

Amicus curiae[17] argued that under the doctrine of *parens patriae* a special relationship existed between juvenile probationers and the State that created a special need to supervise and monitor juveniles, subject only to a juvenile's right to be free from arbitrary, capricious or harassing searches. The Supreme Court disagreed:

> "First, we believe that a search founded on neither reasonable suspicion of criminal activity nor advance knowledge of a probation search condition can aptly be characterized as arbitrary. Second, ***we cannot permit application of the doctrine of parens patriae to defeat the primary purpose of the exclusionary rule–to deter police misconduct.***" (Emphasis added.) (*Id*, at p. 138.)

Other states have also rejected the concept that rehabilitative goals minimize a juvenile's Fourth Amendment rights, or lessen the exclusionary rule's purpose of deterring police abuse of Fourth Amendment rights. (See *State v. Lowry* (1967) 95 N.J. Super. 307, 314, *In re Harvey* (1972) 222 Pa. Super. 222, 228, and cases cited therein.) California

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[17] The Los Angeles County District Attorney's Office.

appears to agree, and yet, without explanation, and by way of legislation no less, provides adults with greater Fourth Amendment protection than juveniles. This statutory scheme, which impedes a juvenile's right to due process of law and fundamental rights guaranteed under the Equal Protection Clause and the Fourth Amendment, needs to be corrected.

II. The Motion to Suppress

a. The Law

The Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of citizens, whether the intrusion is characterized as an "arrest" or "investigatory detention." (Quotations original.) *Davis v. Mississippi* (1969) 394 U.S. 721, 726-727. Mere presence in an area where a crime has occurred, by itself, is insufficient to justify a detention for investigatory purposes. *Illinois v. Wardlow* (2000) 528 U.S. 119, 124; *Ybarra v. Illinois* (1979) 444 U.S. 85, 91. "Nor may the police seek to verify their suspicions by means that approach the conditions of arrest." *Fla. v. Royer* (1983) 460 U.S. 491, 499. (See also *Kaupp v. Texas* (2003) 538 U.S. 626; *Dunaway v. New York* (1979) 442 U.S. 200, 214-215.)

b. Testimony at the Motion to Suppress

When Deputy Smoot contacted Petitioner and his co-participant he was on duty, in uniform, and driving a marked patrol unit. The detectives who

assisted in stopping the juveniles were in a different vehicle. Both patrol units pulled up to the two juveniles at approximately the same time. Deputy Smoot and the detectives exited their vehicles at the same time and Deputy Smoot advised both juveniles why he was stopping them. The court found the juveniles were detained.

On the day Petitioner was detained Deputy Smoot was aware of other vandalisms and burglaries that had occurred at the church. He was also aware of a service call regarding staff from the church reporting they were in contact with someone possibly related to a crime that had occurred at the school and were requesting the SBSO contact them.[18]

The reporting party at the church, Mr. Kelliher, reported someone had broken a window on a school bus and stole a first-aid kit from inside the bus. Mr. Kelliher ***suspected*** the vandalism occurred the prior evening. Mr. Kelliher did not know how many people were involved in the vandalism and could not provide any suspect leads. The only vandalism reported was that done to the bus. Mr. Kelliher was not asked if he was alone when he discovered the damage to the bus.

While investigating the scene Deputy Smoot saw footprints leading up to the vandalized bus.

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[18] Petitioner attempted to further cross-examine Deputy Smoot regarding the other person referenced in the service call but was prevented from doing so by the court which held the line of questioning to be irrelevant.

There were numerous shoe tracks in the area where the first-aid kit was found. Deputy Smoot did not ask how many people had walked between the location where the bus was located and the first-aid kit was found. He did not check to see if any of the shoe patterns near the bus matched Mr. Kelliher's shoes.

While conducting his investigation Deputy Smoot was contacted by a nearby resident who reported he had two possible suspects on video. This witness had seen the persons on the video walking in the area pretty consistently after 3:00 p.m. every day going towards the church grounds. The witness advised he captured these persons on video running on the school grounds the day before and saw them pushing a lawnmower on the softball field. The witness did not communicate any knowledge about the vandalism to the bus. There were shoe tracks around the area where the lawnmower was located that matched the shoe tracks seen around the vandalized bus.

Deputy Smoot watched the video and saw two male juveniles walking east towards the church property. One was wearing red baseball gloves. He also saw both running toward the area where the bus had been vandalized. He did not observe anything else on the video. When asked if there was anything suspicious about the two juveniles Deputy Smoot responded "Other than [co-participant] wearing baseball gloves, they looked like two regular kids walking down the road." He did not recall seeing the juveniles on the video pushing the lawnmower, and

no vandalism to the lawnmower, or to the structure where it was housed, was reported.

Deputy Smoot testified the church property is located on several acres and the bus that was vandalized was on the opposite side of the property of where the lawnmower was located. Deputy Smoot conceded that by watching the video he could not ascertain the juveniles were specifically running to the bus; he could only say they were running in the general direction.

Other than trespassing, Deputy Smoot did not see the juveniles doing anything illegal on the video. However, he could not tell by watching the video if either juvenile was a member of the church, if either went to the school located on the church property, or whether they had consent to be on the property. There were no "no trespassing" signs along any of the fence lines, and there were gates leading onto the church property that were open and that anyone could walk through.

c. Discussion

It was reported it was ***suspected*** the vandalism to the bus occurred on the ***evening*** of February 3, 2009, the day Petitioner and his co-participant were seen on the video on the church grounds. The boys were seen on the church grounds on the afternoon of February 3, 2009, not the evening. There was no evidence they were seen on the school grounds on any other day.

The crux of the government's case appears to be the shoe tracks around the bus and the lawn mower. However, Deputy Smoot failed to investigate if the shoe tracks around the bus or the lawnmower were from Mr. Kelliher's shoes, or from another employee, student, etc. who may have walked in the area between the time the vandalism occurred and the time SBSO arrived. Deputy Smoot had no way of knowing whether the shoe tracks around the bus and the lawnmower were related to the vandalism, especially since it is not clear the vandalism even occurred the day before. Deputy Smoot, at best, had a hunch the tracks might be related to the vandalism, but nothing more.

The video is no more helpful. Deputy Smoot conceded Petitioner and his co-participant simply looked like two kids walking down the street. There is nothing "suspicious" about the fact Petitioner's co-participant was wearing batting gloves: He was walking towards a baseball field; and there is nothing to say the wearing of the batting gloves was nothing more than a teenage fashion statement. Certainly, there was nothing about the fact that the co-participant was wearing batting gloves that would indicate he was involved in any type of criminal activity, including vandalism.

There was nothing on the video that indicated the boys were engaging in criminal activity, *e.g.* trespassing. Deputy Smoot conceded he could not tell if the boys were members of the church, students at the school, or had consent to be on the school property. There were no "no trespassing" signs on

any of the fence line surrounding the property. One of Petitioner's exhibits admitted at the motion to suppress show one location where there appears to be an open invitation to the general public to enter the church property. Deputy Smoot's testimony confirmed there were more.

Deputy Smoot's representation that the boys are seen on the video running towards the bus that was vandalized is unpersuasive. Another exhibit admitted at Petitioner's suppression hearing, an aerial photograph of the church property, shows the church property to be a large, sprawling complex and that the lawnmower and the bus are on completely opposite sides of the property. The boys are seen running on the video on a portion of the property that was farthest away from the bus. It is speculation in the most literal sense of the word to say on the video the boys were running *to* the bus; they could have been running anywhere.

d. Conclusion

Petitioner was unlawfully detained and all evidence seized as a result of the unlawful detention should have been ordered suppressed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX A

Minute order reflecting denial of motion to suppress by juvenile court, dated August 26, 2009.

[FILED UNDER SEAL]

APPENDIX B

COURT OF APPEAL – STATE OF CALIFORNIA
FOURTH DISTRICT
DIVISION TWO

ORDER

T.B., Petitioner, v. THE SUPERIOR COURT OF SAN BERNARDINO COUNTY, Respondent; THE PEOPLE, Real Party in Interest	E049373 (Super. Ct. No. J226707) The County of San Bernardino

CONFIDENTIAL

THE COURT

The petition for writ of mandate and request for immediate stay are DENIED.

HOLLENHORST

Acting P.J.

cc: See attached list

FILED
October 9, 2009
COURT OF APPEAL FOURTH DISTRICT

APPENDIX C

Court of Appeal, Fourth Appellate District, Division Two – No. E049373

S177112

IN THE SUPREME COURT OF CALIFORNIA

En Banc

T.B., Petitioner

v.

SUPERIOR COURT OF SAN BERNARDINO COUNTY, Respondent;

THE PEOPLE, Real Party in Interest

The application for stay and petition for review are denied.

GEORGE

Chief Justice

SUPREME COURT
FILED DEC 17 2009
Frederick K. Ohlrich Clerk

Deputy